DEC 28 1999

No. 98-1987

In The

# Supreme Court of the United States

ROBERT VALDESPINO; BRENDA ROLON,

*Petitioners,*

v.

ALAMO HEIGHTS INDEPENDENT SCHOOL DISTRICT, ET AL.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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## RESPONDENTS' SUPPLEMENTAL BRIEF

The amicus curiae brief of the United States suggests several reasons for this Court to grant certiorari in *Valdespino v. Alamo Heights Independent School District*. The record in this case, however, is not sufficiently developed to permit this Court's meaningful review and resolution of the issues highlighted by the United States.

### I.

### The Record in *Valdespino* Is Not Fully Developed on the Issue the United States Asks the Court to Address

The United States urges the Court to revisit the test set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to determine whether *Gingles* imposes an absolute requirement that a minority demonstrate its ability to constitute a majority in a single-member district as a prerequisite to bringing a dilution claim under section 2 of the Voting Rights Act. The problem is, the petitioners in *Valdespino* did not try their case, or develop a record, on the theory that they could successfully elect the candidate of their choosing notwithstanding their failure to constitute a majority in a putative single-member district.[1]

Instead, petitioners argued that they *could* demonstrate the existence of a majority. The district court

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[1] Plaintiffs argued that they would have the ability to elect a representative of their choice in what they contended was a Hispanic majority district; they never specifically addressed whether they had the ability to elect a representative of their choice in a *non-majority* Hispanic district. Such a hypothetical claim would seemingly require evidence of expected cross-over votes from non-Hispanics – something plaintiffs never offered.

rejected their population numbers and adopted those of Alamo Heights Independent School District, which demonstrated that plaintiffs could *not* comprise a majority in a putative single-member district.

The United States correctly observes that the record contains evidence that "in a similar neighboring district where Hispanics make up slightly less than a majority of the CVAP of the district, Hispanic voters had succeeded in electing their candidate of choice." Br. of the United States at 15. The United States contends that the district court erred in not considering this evidence. *Id.* The problem is that this theory was never truly developed or tried in this case. In fact, the evidence cited by the United States encompasses virtually all of the evidence in the record pertaining to this issue. The record is so sparse that it does not even reveal whether the election in the neighboring district was contested. *Valdespino* lacks any meaningful record on the issue the United States urges this Court to decide.

## II.

### This At-Large Case Does Not Present the Legal Issue that Will Arise in the Wake of Redistricting Following the 2000 Census

*Valdespino* also is an inappropriate vehicle for lending guidance to the lower courts on the redistricting issues that inevitably will arise following the 2000 census. *See* Br. of the United States at 14-15 (inviting the Court to resolve section 2 issues prior to the redistricting to follow the next decennial census). *Valdespino* involves a challenge to an at-large system. The cases that will arise in

the wake of the 2000 census will involve challenges to the redrawing of district lines in light of population changes. Redistricting is a distinct issue from the at-large challenge presented in *Valdespino*. As this Court has noted, the *Gingles* analysis may need to be modified when it is used in the context of at-large challenges as opposed to redistricting challenges. *See Johnson v. DeGrandy*, 512 U.S. 997, 1007, 1013 (1994). Consequently, *Valdespino*, an at-large case, is an ill-suited vehicle for advising lower courts on the proper application of *Gingles* in the post-2000 census, redistricting context.

## III.

### The Practical Issue the United States Raises Regarding Citizen-Voting-Age Population Percentages Was Not Controverted in this Case

Finally, this case does not present the citizen-voting-age population (CVAP) issue the United States urges this Court to address. *See* Br. of the United States at 18 (suggesting potential impropriety of using 1990 CVAP percentage with adjusted population numbers for 1997). The plaintiffs in *Valdespino* testified to the same CVAP percentage presented by Alamo Heights' expert demographer – undoubtedly because it was more favorable to them than the CVAP percentage originally proposed by their own witness. *See* Tr. 375, Def. Ex. 24 at 3-5 and Ex. 3; Pl. Ex. 1-b. There was no controversy between the parties over the proper CVAP percentage.

The United States appears to endorse both the Fifth Circuit's and the respondents' view that as a matter of law section 2 protects the right of "citizens" to vote. *See*

*id.* at 16-17. However, the United States argues that as a *practical* matter, as opposed to a legal matter, use of CVAP data may disadvantage minority groups whose citizenship percentage may have improved since the last census. *See id.* at 17. Again, that practical issue is not presented in *Valdespino*, where all parties agreed on the proper CVAP percentage to apply.

## CONCLUSION

Should the Court wish to revisit *Gingles* to advise lower courts on the proper standard to apply to the redistricting cases that inevitably will arise in the wake of the 2000 census, this Court may wish to focus its efforts on a case that actually involves redistricting, as opposed to an at-large challenge. Similarly, should the Court wish to revisit the *Gingles* test to determine the availability of an ability-to-elect claim in circumstances where a minority cannot comprise a majority within a putative district, the Court may wish to turn its sights on a case in which the evidentiary record was developed in furtherance of that type of claim. The United States has highlighted several policy concerns over proper application of the

*Gingles* test, but the record in *Valdespino* renders it an ill-suited vehicle for resolving these issues.

Respectfully submitted,

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Dated: December 27, 1999

Supreme Court, U.S.
FILED
JAN 4 2000
CLERK

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## PETITIONERS' SUPPLEMENTAL BRIEF

The Respondents have filed a supplemental brief in response to the amicus curiae brief of the United States in which they make the assertion that the record of this case is not sufficiently developed to permit the Court meaningful review and resolution of the issues highlighted by the United States. The Respondents' objections, however, do not accurately reflect the record in this case.

### I. The Record in *Valdespino* Was Fully Developed on the Issue the United States Asks the Court to Address.

The United States has urged that the petition for certiorari be granted so that this Court may resolve definitively the question of whether Section 2 plaintiffs claiming vote dilution must invariably show that they constitute a majority of the citizen voting age population of a single member district. The Respondents contend that this issue was not presented or developed below, and therefore, does not merit this Court's review. The Respondents are wrong.

Rule 10 of the Supreme Court Rules specifically identifies some, but not all, situations in which the United States Supreme Court may, in its discretion, accept certiorari. A ruling by a court of appeals addressing an issue that merits this Court's review may provide sufficient grounds for a grant of certiorari. *Id.* The United States Court of Appeals for the Fifth Circuit was presented with the issue of whether Section 2 imposes an absolute requirement that a minority demonstrate its ability to constitute a majority in a single member district as a prerequisite to bringing a vote dilution claim under Section 2. (Appellants' Brief, p. ix, Statement of

Issues, Issue 2: Whether the so-called *Gingles I* requirement is a "bright-line" test that may only be met by producing a majority minority citizen voting age population single member district?; Appellants' Brief, pp. 5, 7-11, "[T]he District court failed to evaluate the evidence to determine whether the plans submitted by the Plaintiffs established that, absent the at-large election system, Plaintiffs would have an equal opportunity to elect candidates of their choice."; Reply Brief for Appellants, pp. 1-7.) Moreover, the Fifth Circuit adopted a "bright-line" test that may only be met by showing that minority plaintiffs exceed 50% of the citizen voting age population of a single member district to satisfy their burden under *Gingles I*. (Appendix 9a-10a). Clearly, the issue was properly presented and ruled upon by the United States Court of Appeals.

The issue was also presented at the trial.[1]

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[1] The Respondents also assert that no evidence of cross-over voting by the majority Anglo voters was ever presented. (Respondents' Supplemental Brief, p.1, n.1) This is also wrong. Petitioners submitted an election analysis by their expert, Dr. Robert Brischetto. In his analysis of racially polarized voting, Dr. Brischetto provided estimates of support for the Hispanic preferred candidates from the Hispanic community, **the non-Hispanic community,** and from the Alamo Heights I. S. D. at-large. (Plaintiffs' Exhibit No. 44; Record Volume 4, Trial Transcript Vol. I, pp. 190-214). In his ecological correlation and regression analysis, Dr. Brischetto looked at almost forty elections over a ten year period. *Id.* This evidence showed a range of support for the Hispanic preferred candidate **from the non-Hispanic community** of: between 6% and 27% in 1986; between11% and 39% in 1988; between 18% and 58% in 1990; between 12% and 31% in 1992; between 14% and 44% in 1994; and between 15% and 26% in 1996. *Id.* Moreover, these rates of cross-over voting were taken into account when Petitioners' expert testified that the putative district provided Hispanics an opportunity to elect candidates of their choice. (Record Vol. 6, Trial Transcript Vol. III, pp. 462-464) Therefore, Plaintiffs indeed submitted evidence showing the degree of

Respondents' assertions their putative *Gingles* districts to determine whether they provided a viable opportunity for the Hispanic voters of the Alamo Heights Independent School District to elect candidates of their choice, and urged that no "bright line" test be applied in reviewing the evidence on the *Gingles I* issue. (Record Volume 5, Trial Transcript Vol. II, pp. 386- 388; Record Volume 7, Trial Transcript Vol. IV, pp. 762-764, Plaintiffs' closing argument: "The question is whether the plaintiffs have produced a district in which the minority community has a viable opportunity to elect a candidate of its choice.")

Finally, Respondents urge that certiorari be denied because the record is sparse on this issue. To the contrary, the record is substantial and certainly sufficient to address the issue and determine that Hispanics would have an opportunity to elect candidates of their choice in the single member districts submitted by the Petitioners in this case. As has been argued by both the Petitioner and the United States, this case presents significant issues which merit review by this Court.

## II. The *Gingles I* Threshold Requirement Applies Equally to Both Single Member and At-Large Election Systems.

The Respondents next argue that certiorari should be denied because a ruling here will not provide guidance to the redistricting issues that will surface with the publication of the 2000 census. (Respondents' Supplemental Brief, p. 2-3) The Respondents argue that since this case involves an at-

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cross-over support enjoyed by the Hispanic preferred candidate and of its impact on the viability of the putative district.

large challenge and redistricting will involve single member districts, this case is "ill-suited" for advising lower courts on the proper application of the *Gingles* standards. Yet, this Court has held that the *Gingles* factors, including the geographic insularity factor, apply in challenges to single member as well as multimember districts. *Growe v. Emison*, 507 U. S. 25, 40-41 (1993). Consequently, a determination of the issue in *Valdespino* will provide guidance to lower courts and legislatures on the proper application of *Gingles* in the post-2000 census redistricting.

## III. The Appropriate Use of Citizen Voting Age Population In Measuring *Gingles I* Compliance Was Controverted in this Case

The Respondents' final argument is that since the Plaintiffs used the same citizen voting age population (CVAP) numbers to support their claims as the Defendants, the parties are now foreclosed from challenging the use of CVAP as the ultimate benchmark to determine compliance with the *Gingles I* precondition. Petitioner in fact presented evidence of the deficiencies in the CVAP data. (Record Vol. 4, Trial Transcript Vol. I, pp. 225-227; Record Vol. 5, Trial Transcript, Vol. II, pp. 375-378) However, neither the Petitioner, nor the United States, argues for ignoring citizen voting age population altogether. Respondents' argument simply misconstrues the issue presented here.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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